



1935

Current Legal Literature in the Field of Civil Procedure During 1934

Paul L. Sayre
State University of Iowa

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Civil Procedure Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Sayre, Paul L. (1935) "Current Legal Literature in the Field of Civil Procedure During 1934," *Kentucky Law Journal*: Vol. 23 : Iss. 4 , Article 4.

Available at: <https://uknowledge.uky.edu/klj/vol23/iss4/4>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

CURRENT LEGAL LITERATURE IN THE FIELD OF CIVIL PROCEDURE DURING 1934*

By PAUL L. SAYRE†

There are certain significant developments in the field of procedure which have not been treated in legal writings during the past year in an adequate way. Those engaged in law teaching and law writing come to think that in large part, at least, the leadership in legal thought is with them. Certainly the opportunities and privileges of law teachers make this leadership reasonable and fitting. We must recognize, however, that it is not always exercised in fact. For instance, the Association of State Bar Association Delegates has recently considered the problem of compensation without fault under various plans for compulsory insurance in which those who incur injuries in automobile accidents will receive compensation in spite of their own fault. The entire proposal was considered on the whole favorably. This is the more surprising when we recognize that the plan involves taking from the regular courts and from the lawyers who practice there what has been regarded as their appropriate field of litigation and turning it over to some quasi-administrative tribunal to assess compensation for loss apart from the usual allocation of blame under common law principles. This is such a basically important change in our legal system that one might reasonably expect any general consideration of it by the Bar itself to be preceded by various theoretical discussions and investigations by legal writers.

A second development of procedure of even greater importance is that of the integration of administrative bodies into the regular court system in the several states and into the Federal court system. We are presented with the striking illustration in this matter that equity itself began as an administrative activity of the executive. Furthermore, several other courts

*The main outlines of this article were presented before the Round Table Conference on Current Legal Literature at the Thirty-Second Annual Meeting of the Association of American Law Schools, December 27, 1934.

†Professor of Law, State Univ. of Iowa, College of Law, A. B., Harvard (1916); J. D., Chicago (1920); S. J. D., Harvard (1925); contributor to various legal periodicals.

of a somewhat similar nature such as the Star Chamber and the High Commissioners for Ecclesiastical Affairs were also administrative activities of the Crown and strikingly separate both from the legal courts and from Parliament. In time, however, equity developed from this administrative field of the executive into an integral part of the regular administration of justice through the general courts. Its peculiar powers and technique have remained largely distinct, but no one would question that it is now an integral part of the judicial process as differentiated from administrative or executive action. In England the Star Chamber and the Ecclesiastical Commissioners, as well as other administrative bodies with judicial powers, have ceased to exist, and in some measure their functions have been relegated, not exclusively to the regular courts, but in part to later commissions or special agencies of administrative character. We are met at once with the question of whether this process of absorbing administrative bodies into the court system shall continue in particular cases or whether we shall continue indefinitely with the confused condition we have now in the United States, with a myriad of administrative bodies with vast powers and of vast importance remaining outside the regular court system.

Because equity was absorbed into the judicial system, it did not follow that the Star Chamber would be permanently absorbed. Of course, therefore, it may be that some of our administrative bodies may be absorbed into the judicial system now, while others are left outside in their present form, or later changed or abolished altogether, with a redistribution of their functions to existing agencies or to new agencies yet to be created. The basic problem, however, is the orderly and reasonable absorption of administrative bodies, whose powers are comparable to those of the regular courts in affecting the interests of persons and property, but whose processes are still in nebulous form and whose permanence and dignity are treated as entirely subservient to those of the regular court system. The analogy to the *droit administratif* of the continent must be in one's mind when he considers this problem for our country. Certainly the integration of various administrative activities into some recognized and orderly system is predicated upon the greater experience of the civil law, based upon the Roman law. It may well be that

these administrative bodies, while a part of the judicial process in a general way, will still be integrated into a separate branch, roughly analogous to the system of administrative law on the continent of Europe. A thorough-going absorption or an entirely logical and complete absorption is surely not seriously urged, and it would seem most unwise so far as we can judge such a matter *a priori*. The one matter worth mentioning is that no considerable theoretical and impartial investigation of the problem with a presentation of data and reasons has been made by legal writers in the field of procedure up to the present time. We find the practicing lawyers and the judges themselves coming forward to demand some sort of integration of administrative activity into the judicial system. These proposals for action are made although they have not been preceded by the impartial investigations and critical writing which wise legislation or judicial changes could reasonably expect.

By way of rough analogy, it seems perhaps that we are now confronted with a situation not strikingly dissimilar from that of the England of 1865, when the demands of lay opinion forced the appointment of a royal commission for the basic revision of procedure and the court system in England. True, the lawyers themselves were fortunately responsible in large measure for the actual changes secured through the Judicature Acts of 1873-75, but those striking changes were not preceded by legal demand for reform or by considerable critical writing by lawyers which could point the way for new developments. In the scope and powers of administrative bodies themselves, the work of legal research and legal scholars has been of the first importance, beginning with the late James Bradley Thayer and continuing down through the efforts of Felix Frankfurter, Thomas Reed Powell, and Edwin M. Borchard. In a word then, legal writing has admirably covered the field of constitutional law development and the substantive side of administrative law in the last forty years, but the procedural side of the problem and its ultimate relation to the court system has not received similar attention. It seems likely that the pressure of immediate needs will cause practicing lawyers and judges to effect some realignment and absorption of administrative bodies. It would make for the efficient and sound adminis-

tration of law if these practical demands could be predicated upon impartial and scholarly work.

A third phase of procedure, less significant no doubt than the second just mentioned, is the problem of assessing costs for mistakes by lawyers in the course of litigation and by litigants in contesting unjust claims. In this regard, our practice is strikingly unlike that of the English. Of course, conditions in England are very different, and it is not to be expected that their methods, however advantageous there, should be blindly followed here. The basic situation itself, however, cannot be ignored. The English are concerned about having the one pay the costs who has the unjust claim or the unjust defense, so that the one who acts rightly under the law will not be severely burdened by the contest as he is in this country. On its merits we can say that for a man who obeys the law and carries out his obligations to be put to large expense from time to time at the capricious will of anyone who does not carry out his obligations or breaks the law is fundamentally a serious and unfair burden. As things are, the wrong-doer may force the right-doer into litigation either as plaintiff or defendant, and although he is shown to be the wrong-doer, he bears only his own part of the expense, while the right-doer has no escape from bearing half of the expense, though he justly incurred none of the claim. The English see this fundamental maladjustment, for they try by their system of costs to make the one who unjustly litigates pay the whole cost. Of course, in many cases, where the legal issue is a close one, and the litigation of the point is reasonably necessary, they let each party bear the costs.

In this whole connection, furthermore, American lawyers are justly conscious of the very different situation in England. The English people are trained to consulting lawyers with a frequency and a spirit of dependence in which, for better or for worse, American lawyers have never been able to educate our people. Further, their double system of solicitors and barristers makes the cost of justice in England exceedingly high. With full recognition of these matters, however, we can still see what progress they have made along a proper and reasonable course of relief, without in any way approving their entire program or seeking to adopt anything they do in toto. It does seem striking and unfortunate that no actual surveys have

been made in this field and no critical comment upon the more extensive use of court costs to cover the expense of litigation have been published.

A closely analogous, though somewhat different, question is that of assessing costs against legal counsel himself when he has committed the error and his fault can fairly be differentiated from the claim that is actually before the court. Where the attorney, as agent for his client, conducts his client's business in court, it is reasonably to be expected that his personality will merge with that of the claim he represents and hence, perhaps in keeping with the general doctrine of vicarious liability the client will have to bear the consequences of the attorney's mistakes. We must note, however, that the attorney is not only the privately employed agent for his client, but he is also an officer of the court. It is entirely possible and entirely logical for the attorney to bear the expense for errors he himself makes in so far as these can be reasonably differentiated in court proceedings. Here again, the English for many years have developed a considerable technique for assessing costs against solicitors and barristers. We have no similar practice in this country.

The writer is concerned about this matter not only because of the injustice to the client where the consequences of the fault are assessed against him although the attorney made the mistake but more particularly because this confusion gives rise to an unwise statement of procedural rules themselves. The various problems of determining whether a declaration or complaint is adequate and whether a corresponding plea or answer is sufficient are confused and obscured by not differentiating between the purely separate and technical errors of the attorney in the impersonal pleadings and the basic deficiency of the actual claims or defenses themselves.

Fourth in this list of important phases of procedure that have not been treated during the past year, the writer cannot but list arbitration, not because it has failed to be treated at all, but because it has not been considered from the procedural point of view. The symposium on arbitration law to which the November issue of the Pennsylvania Law Review was devoted and the splendid casebook on equity by Professors Chafee and Simpson are both significant contributions to arbitration law

itself from a substantive law angle. After all, the significant thing about arbitration law now is, first, that claims are settled by arbitrators without the hurdles of common law procedure and common law evidence in the rendering of the decisions, and, second, claims are settled by experts on the facts, i. e., the arbitrators, with appeal to the courts for expert decision on the law. We surely consider arbitration in contra-distinction to procedure in the regular courts. Hitherto, when the method of enforcing an award of arbitrators in equity in the regular courts was the important thing, it was perhaps not unreasonable to consider arbitration as a phase of equity, regarding equity as a technique of its own. If we are to talk practically and objectively, it surely is unfair to lose sight of the significant fact that arbitration involves a different method for settling disputes, although, of course it does also involve certain peculiar concepts of traditional equity and traditional common law. Very little has been written between inflexible covers on the procedural side of arbitration, although there have been a number of excellent articles in law reviews.

We are reminded of Dean Pound's famous comments emphasizing the law in the books and the law in action. Surely the main conductor between the law in the books and the law in action is procedure. All who work in the law are concerned at least indirectly with securing the realization of a just decision in each particular case. For the purposes of analysis and presentation the procedural aspects are often pushed into the background. Nowhere in the casebooks or in the law schools is arbitration as a procedural method considered or taught. It would be erroneous, however, to feel that the somewhat nebulous rules of arbitration procedure can be picked up incidentally in the law practice itself. The technique of practice and procedure before arbitration bodies is of the first importance. It seems that the treatment and teaching of the procedural side of arbitration law has been unfortunately neglected in our legal writings.

Fifth, another matter which has been neglected not only from the procedural side but from the substantive law side as well is medical jurisprudence. Perhaps it is not too much to say that there never has been an honest, scholarly work published on the legal side of medical jurisprudence. The field has been

given over to technicians and to those physicians who may deal with the medical side of it admirably, but whose legal equipment and critical outlook have been inconsiderable. It is no disparagement of those who write in this field to say that they have had their eye on writing a handbook of information in one field of legal liability in the medical world. They have not approached the problem from the point of view of independent and scholarly work of a basic character.

For one thing, it may be the time has come when some kind of liability in tort by charitable institutions, including particularly hospitals, should be considered by the legal profession. Surely we are all deeply indebted to Professor Borchard for his careful work and constant effort in the field of state liability in tort. It would seem fortunate to have a similar consideration of liability in tort by charitable institutions. This is mentioned incidentally to the serious problems which procedure and evidence in medical jurisprudence have raised. It appears that many physicians who pay annual fees to medical protective associations feel that such insurance amounts to paying an unjust tribute, made necessary by the reprehensible conduct of certain classes of lawyers. On the other hand, those who receive medical attention often feel that the rules of expert testimony in evidence and many phases of procedure make recovery in tort where there are just claims unduly burdensome for the litigant. Would it not be fortunate to have a scholarly and thorough reconsideration of the whole legal structure of medical jurisprudence and the legal rights and obligations of charitable institutions? Certainly nothing significant has appeared in this field during the past year.

Sixth, a final phase of writing and procedure is the approach to procedure itself. It seems that our works on pleading and practice, admirable in their analytical thoroughness and pragmatic understanding, are nevertheless defective in that they do not consider procedure from the point of view of contest. The declaration or complaint, as well as the later pleadings, are considered impersonally, much as one would explain the character of a life estate or an estate for years in the law of property. The significances of the several procedural methods are not presented in their appropriate place as part of a contest. It may seem hard and ungrateful to mention this

characteristic, and it may well be denied that this defect exists. Very roughly, we may say it is the difference between dramatic writing and expository writing. It may be an exposition of the characters in *Hamlet* involves vast learning, but such an expository narrative is certainly very different in its approach and in its effect on those who read it from the dramatic presentation of the play itself.

In this connection, we are to remember that our frontier history has made us a technical people, so far as litigation is concerned. We have regarded technical rules as part of our precious rights, and this not always for worthy reasons. We must remember in our own minds for purposes of intellectual honesty, that in fact the noble pioneer not infrequently treated his debts in the old home town rather casually, and he became a pioneer and went to a new community without failing entirely to note that this method might help him to avoid paying his debts. In this attitude our people have been not dissimilar from other people, and there is much to be said for this point of view under the circumstances. Without assessing moral blame of any kind, we must note what may seem at first sight to be a paradox, namely, that the simple, open, honest pioneer is the one who delights in legal technicalities under these circumstances, while the effete, visionless traders in the old community desire simplicity of pleading and prompt and efficient disposal of litigation.

The point of view of contest and the attitude of the litigants has been of the first importance from the earliest times, although perhaps Dean Pound is the first to point this out in a significant way. In spite of the fact that the approach to the law and the significance of the rules for bargaining purposes and for contest purposes are so important, our legal treatises in procedure present the material in exposition rather than showing their significance to the legal contest. In comparison the English in their writings in procedure give one more the atmosphere of a contest, so that one consciously and unconsciously considers the significance of procedural rules in their bearing on court contests and all of the elements of bargaining and burdens that are inevitably connected therewith.

If one asks, do you want us to point out the crude advantages of certain legal devices, and so lower the plane of writing:

on procedural questions, the writer must plead in confession and avoidance. As long as procedural rules are used for personal advantage in preventing a decision on the merits or enabling one party to wear out the other, the merits of these rules should justly be considered in view of these practical effects. On the other hand, it cannot be felt that such a presentation rightly handled, involves any lack of dignity or any debasement of procedure itself. It could not justly be said that the English treatises on procedure are defective in these same significant respects. Yet one reads them with a certain fascination, to note the effect for good or evil of the several pleading devices and is conscious at every turn of what this myriad of technical activities costs in dollars and cents for the litigants. Finally, we must remember that while the English frankly discuss the advantages of procedural rules in winning contests and securing compromises regardless of the merits of the legal claims themselves, they are also zealous in opposing these evils, and, on the whole, have secured a simpler scheme of procedure than obtains anywhere in the United States today.